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No. 99-1341

In the Supreme Court
OF THE
United States

VAN NESS ASSOCIATES, LTD.,
Petitioner,

VS.

THE MITSUBISHI BANK, LTD., DRESDNER BANK AG,
CAISSE NATIONALE DE CREDIT AGRICOLE, INSTITUTO BANCARIO
SAN PAOLO DI TORINO, FOREIGN BANKING CORPORATIONS;
AND 1650 MISSION ASSOCIATES, LTD.,
A LIMITED PARTNERSHIP,
Respondents.

On Petition for a Writ of Certiorari to
The Court of Appeal of The State of California
First Appellate District, Division Four

PETITIONER'S REPLY BRIEF

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9 pp

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TABLE OF CONTENTS

Page

The Constitutional Issue Was Timely Raised in the Court of Appeal Below 1

It Is Appropriate for the Supreme Court To Grant Certiorari 2

The Issues Presented by the Petition Are Important 3

A. This case involves banks that have been paid far in excess of the amount owed on the loan. 3

B. The Court of Appeal transposed petitioner's rents into security through the retroactive application of a statute. 4

C. The use of state processes for collection of substantially more than is owed on a debt is constitutionally prohibited and warrants this Court's intervention 4

Conclusion 5

TABLE OF AUTHORITIES

Page

Cases

Edenfield v. Fane, 507 U.S. 761 (1993) 2
Gelfert v. National City Bank of New York, 313 U.S. 221 (1941) 1-2, 4-5
Honeyman v. Jacobs, 306 U.S. 539 (1939) 1
In re 500 Ygnacio Associates, Ltd., 141 B.R. 191 (Bkrtcy. N.D. Cal. 1992) 5
Landgraf v. USI Film Products, 511 U.S. 244 (1994) 4

Constitution, Statutes and Rules

U.S. CONST., amend. XIV, § 1 4
CAL. CIVIL CODE 2938, repealed by STATS. 1996, ch. 49, § 1 4
CAL. CIVIL CODE 2938, added by STATS. 1996, ch. 49 (S.B. 947), § 2 4

PETITIONER'S REPLY BRIEF

This reply brief is necessitated by the new issues raised in the opposition filed by the respondents The Mitsubishi Bank, Ltd., et al. (the "Mitsubishi Group"), to the petition for certiorari filed by petitioner Van Ness Associates, Ltd. In accordance with Rule 6 of the Rules of the United States Supreme Court, this reply addresses only the new points raised by the respondents' brief.

THE CONSTITUTIONAL ISSUE WAS TIMELY RAISED IN THE COURT OF APPEAL BELOW

The Mitsubishi Group makes the completely false assertion that the constitutional issues in the petition were not raised in the Court of Appeal of California. The contrary is true. The constitutional issues presented by *Gelfert v. National City Bank of New York*, 313 U.S. 221 (1940) and the related case, *Honeyman v. Jacobs*, 306 U.S. 539 (1939), were argued by petitioner in its Reply Brief filed in the Court of Appeal below. At page 13 of the Reply Brief, petitioner argued, as it does here, that "[m]ortgagees are constitutionally entitled to no more than payment in full of the debt," citing *Gelfert* and *Honeyman*.

The respondents argue that the constitutional issue was not adequately specified. But, the *Gelfert* decision did not specify what provision of the Constitution was being invoked. Therefore, it was impossible to specify at that stage the exact provision involved.

The Court of Appeal, while recognizing the *Gelfert* principle, avoided petitioner's constitutional argument by holding that the rents, which constituted the overpayment, were part of the security.[1]

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[1] By recognizing that the banks might be acting "contrary to existing law," the Court of Appeal was tacitly recognizing the *Gelfert* principle that banks cannot constitutionally receive "more

In order to reach this result, the Court of Appeal applied a statute retroactively, even though the statute specified it was *not* to be applied retroactively. (E:31.) The Court of Appeal reasoned that the rents must be security because if not, the banks were acting "contrary to existing law." (A:17.) Not wanting to hold that the banks were acting contrary to law, the Court of Appeal found that the rents were part of the security.

The Constitutional issue *was* timely raised by petitioner. There was no waiver of the issues.

IT IS APPROPRIATE FOR THE SUPREME COURT TO GRANT CERTIORARI

Contrary to respondents' argument that this case is inappropriate for review by the Supreme Court, the Court should issue certiorari for several reasons:

1. This case involves an important question that should be settled by the Supreme Court (*see* below).

2. The Court of Appeal decision conflicts with the Supreme Court decision in *Gelfert*.

3. The Court of Appeal has departed drastically from the accepted and usual course of judicial proceedings.

The Supreme Court has granted certiorari in instances where a case presents a need for clarification. *Edenfield v. Fane*, 507 U.S. 761 (1993). Here, where it is not certain what provision of the Constitution is involved when a mortgagee receives more than payment in full on a debt, the law should be clarified.

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than payment in full."

THE ISSUES PRESENTED BY THE PETITION ARE IMPORTANT

The issues presented are not frivolous as respondents contend. The retroactive application of a statute, when it specifically states that it is not to be retroactive, and an unconstitutional collection by nationally chartered or foreign banks are important issues.

A. This case involves banks that have been paid far in excess of the amount owed on the loan.

Contrary to respondents' assertion, this case *does* involve banks that have received more than payment in full under the loan agreement. The loan in this case was non-recourse. The banks' Credit Agreement specified as follows:

> ". . . Borrower and the Partner thereof shall have no liability with respect to the obligations evidenced by this Agreement and the Term Notes and secured by the Deed of Trust to repay principal and to pay interest or any prepayment fees or other charges. The Banks waive any such personal liability and agree that, subject to this section 2.12, in the event of the occurrence of an Event of Default under Article VIII, the recourse of the Banks with respect to the obligations hereunder shall be solely to the Property covered by the Deed of Trust and any other security instrument securing the obligations hereunder and the only remedy of the Agent or the Banks shall be the foreclosure on the Property by power of sale as provided in the Deed of Trust or by judicial foreclosure with no deficiency judgment against the Borrower or against the Partner." (C:23.)

This language created a non-recourse loan. In a default situation, the banks were not supposed to receive any more than the value of the building and were to have no recourse against the unsecured assets of petitioner. (*Id.*) The banks were restricted to

assets covered by the Deed of Trust. (*Id.*) The rents were specifically excluded from coverage by the deed of trust. That was the contract between the parties.

Instead, the banks recovered over $22 million in rents that were not part of the security. The banks, contrary to the principles set forth in *Gelfert*, *supra*, *unconstitutionally* took more than payment in full on the contract.

B. The Court of Appeal transposed petitioner's rents into security through the retroactive application of a statute.

Contrary to the respondents' argument, the retroactive application of a statute to reach a result contrary to law raises an important constitutional issue. Although the Court of Appeal recognized that the law at the time of the foreclosure, old Civil Code section 2938, would prevent the rents from being security (A:17), it retroactively applied a revision to section 2938 to hold that the rents were security. Although the new statute specifically provided that it was not to be applied retroactively (E:31), the Court applied it retroactively (A:17-18). The Court's retroactive application drastically departs from accepted judicial procedures and gives the foreign banks a windfall of over $22 million in rents. This is exactly the kind of conduct prohibited by the Due Process Clause of the Fourteenth Amendment of the Constitution. *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

C. The use of state processes for collection of substantially more than is owed on a debt is constitutionally prohibited and warrants this Court's intervention.

The respondent banks argue that there is nothing of importance here because there was no overpayment and the matter involves only

state law.[2] But, the banks should not have been allowed to collect amounts beyond the security. Nor should a court be allowed to apply a statute retroactively to obtain a result. Use of state processes to reach the unconstitutional result should trigger this Court's intervention.

Although *Gelfert* states the general principle that banks are "constitutionally entitled to no more than payment in full," it has never been explained what provision of the Constitution is involved. It is important for lenders to understand that they are bound by constitutional limitations.

Does the Constitution place limitations on over-reaching lenders, as was stated in *Gelfert* — or does it not? Can a court circumvent the rule by retroactive application of a statute? These questions are important and should be reviewed by the Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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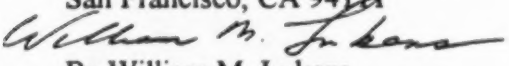

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Dated: February 29, 2000

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[2] The respondents' position is ironic in light of their having convinced the Court of Appeal to rely on a local federal bankruptcy court decision, *In re 500 Ygnacio Associates, Ltd.*, 141 B.R. 191, 195-196 (Bkrtcy. N.D. Cal. 1992).